No. 80-1458

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD J. SWEENEY & SONS, INC.,
MISSION GAS OIL COMPANY, INC.

and

PETROLEUM PRODUCTS CO.,

Petitioners,

—v.—

TEXACO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was sufficient evidence of concerted action introduced at trial to permit a Section 1 Sherman Act conspiracy claim to be submitted to the jury?

2. Does a manufacturer violate Section 2(a) of the Robinson-Patman Act by uniformly applying a hauling allowance program based on actual cost savings to the manufacturer as a result of services performed by distributors?

3. Is a plaintiff entitled to Robinson-Patman Act damages merely from alleged proof of a discrimination in price, where there was no proof that petitioners were damaged by the alleged discrimination or proof that petitioners absorbed the amount of the alleged discrimination?

4. Are indirect purchasers who did not buy on a fixed-quantity cost-plus basis from the direct purchaser barred from antitrust recovery under *Illinois Brick*?

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TEXACO INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION

Respondent Texaco Inc. ("Texaco") respectfully submits that the instant Petition utterly fails to present a single "special and important reason" warranting the issuance, in the exercise of this Court's sound judicial discretion, of a writ of certiorari. *See* Sup. Ct. Rule 19. On the contrary, the principal question presented—whether sufficient circumstantial evidence was introduced at trial to permit a Sherman Act conspiracy claim to go to the jury—has absolutely no significance beyond this litigation. Petitioners themselves admit that the resolution of that question depends solely upon the case's "own particular facts" (Petition at 13). Indeed, petitioners' central argument is

that "neither the district court nor the appellate majority considered all the evidence presented by Sweeney." (*Id.*). Whether the district court and the Third Circuit properly assessed the probative weight of petitioners' trial evidence—and we submit they unerringly did—is hardly a matter which justifies the sparing invocation of this Court's extraordinary certiorari jurisdiction.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was sufficient evidence of concerted action introduced at trial to permit a Section 1 Sherman Act conspiracy claim to be submitted to the jury?

2. Does a manufacturer violate Section 2(a) of the Robinson-Patman Act by uniformly applying a hauling allowance program based on actual cost savings to the manufacturer as a result of services performed by distributors?

3. Is a plaintiff entitled to Robinson-Patman Act damages merely from alleged proof of a discrimination in price, where there was no proof that petitioners were damaged by the alleged discrimination or proof that petitioners absorbed the amount of the alleged discrimination?

4. Are indirect purchasers who did not buy on a fixed-quantity cost-plus basis from the direct purchaser barred from antitrust recovery under *Illinois Brick*?

Statement of the Case

We refer to the exhaustive opinions below for a statement of the relevant facts. (App. A, at pp. 33-36; App. B, at pp. 90-95). However, because petitioners' factual statement is (1) totally silent about the rationale for Texaco's hauling allowance program, and (2) misleading with respect to the precise nature of petitioners' antitrust conspiracy claim, some further elaboration is required.

The raison d'etre for Texaco's hauling allowance program was the cost savings to Texaco generated by having a distributor pick up at a Texaco terminal rather than having Texaco itself deliver to the distributor. Texaco's agreements with its distributors (like Sweeney) required Texaco to deliver fuel at Texaco's sole cost to the distributor's bulk plant from a point of supply designated by Texaco—which cost, quite naturally, Texaco sought to minimize by choosing to deliver the product by the least expensive route.

In lieu of Texaco performing this hauling function, Texaco permitted distributors to pick up product themselves when the distributors requested to do so. In such circumstances, since the distributor was relieving Texaco of the delivery obligation set forth in Texaco's distributorship agreement and the related delivery cost which Texaco would otherwise incur, Texaco granted the distributor a hauling allowance equal to the lowest amount it would cost Texaco to deliver the fuel from Texaco's designated supply point to the distributor's bulk plant by common carrier, contract carrier, or Texaco company truck.

Sweeney's bulk plant was located in Pottstown, Pennsylvania, and, in 1958, Texaco designated its terminal in Westville, New Jersey as Sweeney's supply point. As early as 1966, however, Texaco considered changing Sweeney's designated supply point to Texaco's Macungie, Pennsylvania terminal because the cost of supplying Pottstown had changed and Texaco found that shifting Sweeney's point of supply from Westville to Macungie would save Texaco $2,158 annually on the basis of Sweeney's annual purchases of approximately 3.8 million gallons.[1] Nevertheless, when Sweeney objected (claim-

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1 Texaco had a refinery at Eagle Point (Westville), New Jersey and a terminal next to the refinery. Texaco also had a terminal at Macungie, Pennsylvania. Product was brought by Texaco to the Macungie terminal from the Eagle Point refinery by two interstate pipelines. The economics of delivering to Pottstown, Pennsylvania boils down to the following question: is it less expensive to deliver from Westville to Pottstown (50 miles) by truck (regulated by the Interstate Commerce Commission) than it is to send the product by pipeline from Eagle Point to Macungie (pipeline rates are also I.C.C. regulated) and deliver

ing that it had customers located around the Westville area), Texaco postponed its decision.

By 1970, however, the economics of supplying Sweeney out of Westville had, in the Third Circuit's words, "changed dramatically." (App. A, at p. 35). Instead of $2,158, the undisputed evidence showed that Texaco could effectuate a $58,000 annual cost savings by supplying Sweeney from Macungie instead of Westville.[2] As a result, in December 1970, Texaco informed Sweeney that it was changing Sweeney's supply point to Macungie, as was Texaco's right under the March 1963 hauling agreement between Sweeney and Texaco. When Sweeney refused to go along with the change, Texaco gave Sweeney a sixty-day termination notice, effective February 28, 1971. As a result of ensuing negotiations, however, Sweeney's distributorship was not terminated and the parties entered into a revised hauling agreement on March 1, 1971. Under the new arrangement, Westville continued as Sweeney's designated supply point until May 31, 1971. Thereafter, Sweeney was to pick up product at Macungie and receive a hauling allowance based upon a Macungie supply point—the most economic point of supply for Pottstown. Since the cost of hauling from Macungie to Pottstown was less than the cost of hauling from Westville to Pottstown, Sweeney's hauling allowance was reduced. As a result of its negotiations with Texaco, however, Sweeney received a concession: after May 31, 1971, Sweeney would not be turned away at the Westville gates; Sweeney could continue to pick up at Westville if it chose to do so. The hauling allowance for all purchases would be based on the Macungie to Pottstown trip, however.

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from Macungie to Pottstown (20 miles) by truck (not Federally regulated)? That equation varies with changes in intrastate and interstate trucking rates and I.C.C. pipeline rates, and the volume of product involved.

2 *See* footnote 1 *supra*. That change resulted in part from Sweeney's sales increase from under 3.8 million gallons to 17.7 million gallons in 1970.

The only Section 1 Sherman Act claim for which petitioners sought damages below was that Texaco's reduction in Sweeney's hauling allowance was the product of a conspiracy between Texaco and certain dealers who complained about Sweeney's competitive practices. Although Texaco subsequently sent Sweeney a termination notice in December 1971, Texaco did not cease delivering product to Sweeney and petitioners "withdrew" any antitrust damage claim at trial based on that later event. (App. A, at p. 37 n.1). Thus, as the Third Circuit pointed out:

> "Only the claim of damages based on the change in [Sweeney's] hauling allowance was before the [district] court on the motion for directed verdict, and therefore only that claim is before us now." (*Id.*)[3]

Accordingly, in order to avoid a directed verdict on their Section 1 claim, petitioners were obligated at trial to introduce sufficient evidence that on or before December 1970 there was a conspiracy between Texaco and its dealers. However, all that

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3 Although it is of no moment on the instant Petition, the Court should be aware of the reasons for the December *1971* termination notice. In the summer and fall of 1971, Texaco learned that Sweeney was selling non-Texaco product under the Texaco trademark. After confirming pervasive trademark violations by Sweeney, on December 17, 1971, Mr. Doherty, Texaco's General Manager of the Philadelphia region, recommended Sweeney's termination; a termination notice was sent on December 27, 1971. Following negotiations, Texaco agreed to continue to supply Sweeney while Sweeney looked for an alternate supplier, subject to 10 days' notice of termination by Texaco. That arrangement, which was breached by Sweeney when he filed this lawsuit, had been "institutionalized" for a time by Federal energy regulations.

At trial below, Texaco counterclaimed for a declaratory judgment that Sweeney had breached its contract with Texaco, infringed Texaco's trademark, violated several state statutes and committed common law unfair competition by selling non-Texaco product under the Texaco trademark. Texaco also sought an injunction against future violations. Sweeney conceded the trademark violations at trial and the district court granted Texaco declaratory and injunctive relief. (App. B, at pp. 144-54). The Third Circuit unanimously affirmed. (App. A, at p. 61). Petitioners have not challenged those decisions here.

petitioners proffered were sporadic dealer complaints about Sweeney's and others' marketing practices over a thirteen-year period (1966-1979) plus some bits and snatches of nonprobative testimony which both the district court and the Third Circuit found would have required the jury to engage in unwarranted speculation to find concerted action between Texaco and its dealers. On this record, it is respectfully submitted, a directed verdict for Texaco was eminently correct and, in all events, presents no basis for the exercise of this Court's certiorari power.

REASONS FOR DENYING THE WRIT

I. The Courts Below Correctly Decided That There Was Insufficient Circumstantial Evidence of a Section 1 Conspiracy to Permit That Claim to Go to the Jury; and, in All Events, That Ruling Does Not Present a "Special and Important" Issue for Certiorari

Petitioners do *not* contest the legal proposition at the heart of this case—that complaints from dealers about a competitor, followed at some point by the manufacturer's termination of that competitor, are insufficient standing alone to support an inference of conspiracy between the manufacturer and the complaining dealers; a dealer does not earn a contract in perpetuity by the mere complaint of a competitor. Nor could petitioners dispute this, since it is a fundamental antitrust precept. *See, e.g., Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 523 F.2d 668, 674-75 (9th Cir. 1975); *Carr Electronics Corp.* v. *Sony Corp.*, 472 F. Supp. 9, 12 (N.D. Cal. 1979); *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S.D.N.Y. 1968). As the Second Circuit recently reaffirmed (subsequent to the Court of Appeals' decision challenged in this Petition):

> "[E]ven if Sears' actions were to be viewed as a complaint by one Whirlpool customer about the selling practices of another, *such a complaint would not indicate illegal con-*

> *certed action, since it is merely normal marketplace behavior for such complaints to be made."*[4]

The issue, therefore, on petitioners' Section 1 claim is whether there was sufficient probative evidence of concerted action at trial—beyond mere complaints plus termination—to warrant submitting that claim to the jury. And the resolution of that issue, as petitioners themselves concede, depends solely on the record of this particular case and has no bearing whatsoever on the outcome of any other case with different facts and a different record. Thus, petitioners state that the sufficiency of their conspiracy evidence cannot be assessed by "making a paradigmatic comparison to the particular facts" of other Section 1 cases, but instead must be determined "based upon [this case's] own particular facts." (Petition at 13). For that very reason, this is indisputably not a matter for certiorari. As Justice Holmes declared in *United States* v. *Johnston,* 268 U.S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts." *See also* Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi:

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."[5]

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4 *Oreck Corp.* v. *Whirlpool Corp.,* 1980-81 Trade Cas. ¶ 63,619 at p. 77,283 (2d Cir. 1980) (emphasis added).

5 For the same reason that this case has no immediate importance beyond the particular facts and parties involved, it does not present a "conflict" with the other Section 1 decisions cited by petitioners. (Petition at 10-11, 13-17). The difference in result in those cases turned not upon the application of different legal principles to similar facts, but instead upon the application of the same legal principles to different facts; in other words, it was the quantum and quality of the evidence in those cases which was outcome-determinative. Thus, for example, in *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.,* 633 F.2d 477 (7th Cir. 1980), plaintiff proved not only complaints plus termination, but also that defendant's sales representative actually *agreed* with complaining dealers to eliminate plaintiff's discounting "in response to

In a Procrustean effort to force this case into a certiorari mold, petitioners would have this Court believe that the Third Circuit held that "circumstantial evidence alone is insufficient to prove a § 1 Sherman Act conspiracy between a distributor and a supplier." (Petition at 16). That, indeed, would have been a startling ruling, which perhaps might be worthy of review by this Court. The Court of Appeals, however, held no such thing. Indeed, Judge Aldisert was at pains to acknowledge the importance of circumstantial evidence in a conspiracy case:

> "Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common understanding drawn from circumstantial evidence: 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.' [Citation omitted.]" (App. A, at p. 39).[6]

What petitioners are really complaining about is the Third Circuit's application of the well-settled concomitant to the circumstantial evidence rule; that, in Judge Aldisert's words, "appellant had the burden of adducing sufficient evidence

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complaints." (*Id.* at 480). Nothing even approaching that kind of incriminating evidence was introduced by petitioners below. Similarly, in *Alloy International Co.* v. *Hoover-NSK Bearing Co.*, 1980-81 Trade Cas. ¶ 63,148 (7th Cir. 1980), the record revealed that on the very same day a complaining dealer implored defendant to stop dealing with a price-cutting competitor, defendant directed its salesmen to accept no further orders from that customer. (Appellant's Br. at 8). In stark contrast to the irresistible causal inference there, the evidence below demonstrated that the dealer complaints about Sweeney were not temporally connected to Texaco's change in its agreements with Sweeney; and there was no evidence showing the frequency of the complaints or whether the frequency changed at any time. (*See* App. A, at p. 45).

In short, petitioners cannot transform their failure of proof into a conflict among the Circuits.

6 Similarly, the district court rejected the notion that petitioners were obligated to introduce "direct" evidence of a conspiracy. (App. B, at p. 101 n.25).

from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation." (App. A, at p. 39). As this Court put it in *Galloway* v. *United States,* 319 U.S. 372, 395 (1943):

> "Whatever may be the general formulation, the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Accord, e.g., Venzie Corp. v. *United States Mineral Products Co.,* 521 F.2d 1309, 1312 (3d Cir. 1975) (affirming directed verdict dismissing § 1 conspiracy claim); *Michelman* v. *Clark-Schwebel Fiber Glass Corp.,* 534 F.2d 1036, 1042 (2d Cir.), *cert. denied,* 429 U.S. 885 (1976) (reversing failure to grant judgment *NOV* dismissing § 1 conspiracy claim).

Applying this principle to the record below, the Third Circuit concluded that petitioners' conspiracy "evidence" failed to pass muster. As Judge Aldisert summed it up:

> "The basic record facts were that some of Sweeney's competitors complained that Sweeney's stations undersold them by one to three cents per gallon, that Rodden did not know but 'guessed' Texaco acted to terminate Sweeney because of these complaints, that Murray surmised Texaco was evaluating Sweeney's ability to get long hauling allowances for short deliveries, and that certain consequences of Sweeney's marketing strategy not directly related to Sweeney's competitive position figured into Doherty's decision to terminate Sweeney. Faced with this scanty record, the district court properly removed the issue of concerted action from the jury. It determined that insufficient narrative or historical evidence had been submitted to permit the conclusion that Texaco's decision was a reaction to the specific complaints received. Moreover, the record was devoid of proof of concerted action among Sweeney's competitors and Texaco. The court concluded

> that the jury could not infer this ultimate fact from the basic facts in evidence without engaging in pure *post hoc* guesswork. We will not fault the court for these determinations." (App. A, at pp. 49-50).

Not only does that holding fail to present any question which has "immediate importance far beyond the particular facts and parties involved," but it is eminently correct in its own right.

Petitioners' principal evidentiary argument is that the Court of Appeals "usurped the jury's function" in concluding that the testimony of Daniel A. Doherty, the manager of Texaco's Philadelphia region, was insufficient to support a reasonable inference of conspiracy between Texaco and its complaining dealers. (Petition at 8-9). It is petitioners who are in error, however, not the Third Circuit.

To begin with, contrary to petitioners' implication (Petition at 9), Mr. Doherty was *not* the person who "made the decision" to notice Sweeney's termination in *December 1970*—the only "termination" for which petitioners claimed damages below. Mr. Doherty did not even take over responsibility for the Philadelphia region (including Sweeney) until June 1971. Moreover, the testimony which petitioners rely upon related solely to Texaco's *December 1971* notice to terminate Sweeney—a termination which did not disturb the continuation of Sweeney's supply and for which petitioners do not claim antitrust damages. Accordingly, even if Mr. Doherty's testimony were susceptible to a reasonable inference of concerted action, it would not help petitioners one iota on the only relevant conspiracy question before the Court—whether Texaco's December 1970 termination notice and the resultant reduction in Sweeney's hauling allowance were the product of concerted action.[7]

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7 This is equally true with respect to petitioners' assertion that Texaco "investigated Sweeney's pricing practices in the market prior to termination." (Petition at 11). What petitioners fail to mention is that the alleged investigation took place *after* the reduction in Sweeney's hauling allowance and "prior to" the December 1971 "termination."

Moreover, even had Mr. Doherty's testimony related to the earlier December 1970 termination notice, it was not probative of conspiracy. While Mr. Doherty testified that Sweeney's "marketing strategy" played a small part in Texaco's decision to notice Sweeney's termination in December 1971, a reading of his testimony in context makes it emphatically clear that his concern was for the "consequences" of Sweeney's "marketing strategy": that is, "Sweeney's failure to meet housekeeping, service, or service capability standards—practices contrary to 'the prestige service that had been the hallmark and objective of Texaco retail marketing'—and resulting *customer* complaints." (App. A, at p. 43) (emphasis added). On this basis, the Third Circuit quite properly ruled that it would be "impermissible" for a jury to infer from Mr. Doherty's testimony that Texaco decided to terminate Sweeney in response to *competitors'* complaints about his low prices. (*Id.*)

Equally significant, petitioners' strained reading of Mr. Doherty's testimony was flatly contrary to every reasonable inference which the record did support. First, the evidence showed that competitors' complaints about Sweeney were not limited to the period leading up to the change in Sweeney's hauling allowance; and there was no indication of the frequency of the complaints or that they intensified during 1970-71. As the Third Circuit observed, "[t]hese facts militate strongly against a causal relation between the complaints and Texaco's actions." (App. A, at p. 45). What in fact happened by December 1970 was that Texaco's loss attributable to supplying Sweeney from Westville had increased dramatically from $2,158 to $58,000 annually. Thus, by changing Sweeney's supply point (and its hauling allowance as a result), Texaco was acting in its own economic self-interest, thus "negat[ing] an inference of concerted action. . . ." (*Id.*) Finally, it is noteworthy that the reduction in Sweeney's hauling allowance was less than one cent per gallon. (*Id.* at n.4). As Judge Aldisert remarked concerning this fact:

> "It is difficult to accept appellants' assertion that an action affecting Sweeney's cost by a fraction of a cent was

> taken in response to complaints citing price differentials of several cents, even taking into account the millions of gallons sold." (*Id.* at 45-46).

The long and the short of it is that "aside from the evidence of complaints made to Texaco by other retailers, Sweeney introduced no evidence of a conspiracy between Texaco and its retailers or wholesalers." (App. A, at p. 47). It is not the role of certiorari to save petitioners from their own failure of proof. The Petition should be denied forthwith.

II. The Remaining Robinson-Patman and *Illinois Brick* Issues Are Frivolous

A. Petitioners' Robinson-Patman Claims Were Correctly Dismissed

The Court of Appeals unanimously held on the undisputed facts that Texaco's uniform application of its hauling allowance formula did not discriminate against petitioners in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). On that basis, the Third Circuit affirmed the dismissal of petitioners' Robinson-Patman Act damage and injunctive claims. That ruling—which followed ineluctably from the Second Circuit's holding in *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977)—was unquestionably proper.

In *FLM*, the Second Circuit held that the Robinson-Patman Act

> ". . . requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances. . . . This principle has been applied in cases which found no violation of § 2(a) in pricing plans which, though varying prices according to different terms of sale, were administered equally to all purchasers." (543 F.2d at 1026).

That "principle" fits this case like a glove. The reduction in Sweeney's hauling allowance resulted directly from the equal administration of Texaco's hauling allowance system among all distributors.

The predicate of Texaco's hauling allowance system was the cost savings generated to Texaco when the distributor relieved Texaco of its obligation under its distributorship agreements to deliver product to the distributor's bulk plant from a point of supply designated by Texaco. And the evidence below was undisputed that by 1970, Macungie was by far Texaco's most economical point for supplying Sweeney's Pottstown location. Nor, as the Third Circuit noted, was there any claim—much less evidence—that "Texaco deviated from its hauling allowance formula by switching [Sweeney's] pickup point from Westville, far from Sweeney's storage facility, to Macungie, much closer to his storage facility." (App. A, at p. 56).[8] That such uniform treatment yields a more advantageous result for one distributor than for another due to factors such as the location of the distributors' bulk plants and the distance between those plants and Texaco's terminals cannot convert a legitimate business practice into a Robinson-Patman Act violation.

Petitioners' argument that Texaco's hauling allowance system was illegally based on a "fictional" point of destination—because some distributors like Sweeney did not transport the gasoline they picked up back to their bulk plants, but instead made deliveries to their customers along the way (Petition at 20)—completely ignores the system's rationale: the hauling allowance was the equivalent of the cost savings to Texaco generated by relieving Texaco of its obligation under all of its distributorship agreements to deliver the product it sold to the distributor's bulk plant. Absent hauling by the distributor,

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8 In fact, if Texaco had done what petitioners suggest—if Texaco had kept Sweeney's supply point at Westville rather than switching it to Macungie, the most economical supply point—Texaco would have deviated from the uniform application of the hauling allowance system.

Texaco was obligated merely to deliver to the distributor's bulk plant; Texaco was not required to act as a resale delivery service for the distributor by dropping off some gasoline at every one of the distributor's retail customers along the distribution route. As Judge Aldisert explained for a unanimous Third Circuit:

> "[I]t is the distributors, not Texaco, who determine where to place their bulk storage plants, and it is the distributors, not Texaco, who decide which retail stations they will supply. Texaco has no control over these decisions; it calculates the hauling allowance solely on the bulk plant's location to the nearest pickup point. On this record, we cannot conclude that Texaco's formula forecloses any distributor from an advantageous hauling allowance." (App. A, at p. 57).

Wholly apart from the Third Circuit's holding of no actionable price discrimination, there was an alternative ground for rejecting petitioners' Robinson-Patman Act damage claim—the basis upon which the district court actually rested its dismissal—that, under the doctrine first enunciated in *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), Sweeney failed to prove that it was injured as a result of the alleged price discrimination. (App. B, at pp. 137-43).

At trial, Sweeney claimed that it was entitled to Robinson-Patman damages equal to two-thirds of the difference between its hauling allowance and Grace Oil Co.'s ("Grace") hauling allowance from Texaco plus one-third of the difference between its hauling allowance and Farm & Home Oil Co.'s ("Farm & Home") hauling allowance. And Sweeney advanced that claim without any evidence that either Grace or Farm & Home actually lowered its prices by using its larger hauling allowance and that Sweeney lost sales or lowered its prices as a result. In other words, Sweeney claimed that it was entitled to automatic damages equal to the amount of the alleged discrimination without proof that the alleged discrimination

caused it any actual injury. (App. A, at p. 53 n.6; App. B, at pp. 135-43).

The district court correctly rejected Sweeney's damage theory on the ground that the Robinson-Patman Act is *not* an automatic damages statute; and that a plaintiff must, therefore, prove it was actually injured by the alleged discrimination. (App. B, at pp. 137-43).[9] *Enterprise Industries, Inc.* v. *Texas Co., supra,* 240 F.2d at 458-60. *Accord, e.g., Chrysler Credit Corp.* v. *J. Truett Payne, Inc.,* 607 F.2d 1133, 1136 (5th Cir. 1979), *cert. granted,* 101 S. Ct. 70 (1980); *John B. Hull, Inc.* v. *Waterbury Petroleum Products, Inc.,* 588 F.2d 24, 29 (2d Cir. 1978), *cert. denied,* 440 U.S. 960 (1979); *Continental Oil Co.* v. *Frontier Refining Co.,* 338 F.2d 780, 782 (10th Cir. 1964); *Dantzler* v. *Dictograph Products, Inc.,* 309 F.2d 326, 330 (4th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963); *Kidd* v. *Esso Standard Oil Co.,* 295 F.2d 497, 498 (6th Cir. 1961).

Nevertheless, Sweeney claims that it "absorbed the increased cost" resulting from the reduction in its hauling allowance and thus was entitled to Robinson-Patman damages under the so-called "direct damage rule" set forth in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.,* 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945). (Petition at 23). But the holding of *Elizabeth Arden* has been severely limited (if not overruled) by the Eighth Circuit itself in *American Can Co.* v. *Russellville Canning Co.,* 191 F.2d 38, 54, 60 (8th Cir. 1951), and by this Court in *Perkins* v. *Standard Oil Co.,* 395 U.S. 642, 648 (1969), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat Inc.,* 429 U.S. 477 (1977) (*see* App. B, at pp. 138-39). Moreover, even if the "direct damage rule" were legally viable, Sweeney failed to introduce any evidence to satisfy its essential factual prerequisite—that it absorbed *the amount of the alleged discrimination.*

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9 Although the Third Circuit did not base its Robinson-Patman affirmance on this ground, it went out of its way to endorse the district court's reasoning. (App. A, at p. 53 n.6).

As Sweeney's Robinson-Patman damage claim itself acknowledges, the alleged discrimination was the difference between Sweeney's hauling allowance and the hauling allowances of Sweeney's competitors. The alleged discrimination was *not* the difference between Sweeney's Westville-based hauling allowance and Sweeney's Macungie-based hauling allowance. (App. B, at pp. 137-38 n.66, 143 & n.72). And yet the evidence upon which Sweeney relies to come within the "direct damage" rule is merely that Sweeney absorbed the difference between its old hauling allowance and its new hauling allowance.[10] (App. B, at pp. 143-44 n.72). Sweeney never even attempted to prove that it absorbed the difference between its hauling allowance and Grace's or Farm & Home's.

The record below was devoid of evidence that Grace's or Farm & Home's prices reflected all or any part of their larger hauling allowances; that Sweeney lost sales to Grace or Farm & Home; that Sweeney ever lowered its prices to compete with Grace or Farm & Home; or of any comparison of the movements in price changes by Sweeney to price changes by Grace or Farm & Home. On such a blank slate, petitioners' Robinson-Patman Act damage claims were properly dismissed, even if the "direct damage" theory were legally cognizable—which it is not.

B. Mission's and Petroleum's Indirect Purchaser Damage Claims Were Properly the Subject of Summary Judgment

Petitioners concede, as they must, that as indirect purchasers, Mission and Petroleum cannot assert claims for damages under Section 1 of the Sherman Act or Section 2(a) of the Robinson-Patman Act unless they fall within an exception to the indirect purchaser doctrine established by this Court in

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10 In fact, even that claim—that Sweeney absorbed the entire change in the hauling allowance—is suspect since petitioners claimed in connection with their effort to avoid the application of *Illinois Brick* that Sweeney did *not* absorb the change, but rather passed it on to Mission and Petroleum.

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977). Petitioners claim that they fall within "[o]ne exception that this Court explicitly recognized . . . where the indirect purchaser buys under a pre-existing cost-plus contract. *Id.* at 724 n.12, 736." (Petition at 28).

Petitioners have ignored the narrow scope of that exception, however. This Court expressly limited the cost-plus exception to situations where the "customer is committed to buying a *fixed quantity* regardless of price [because in such circumstances] [t]he effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand. . . ." *Illinois Brick, supra,* 431 U.S. at 736 (emphasis added). *Accord, e.g., Phillips* v. *Crown Central Petroleum Corp.*, 602 F.2d 616, 633 n.4 (4th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980); *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 577 & n.9 (3d Cir. 1979); *Abbotts Dairies Division of Fairmont Foods, Inc.* v. *Butz,* 584 F.2d 12, 16 (3d Cir. 1978); *Beckers* v. *International Snowmobile Industry Ass'n,* 581 F.2d 1308, 1310 (8th Cir. 1978), *cert. denied,* 440 U.S. 986 (1979); *United States* v. *Consolidated Edison Co. of New York, Inc.*, 580 F.2d 1122, 1132 n.21 (2d Cir. 1978). Since there admittedly was no *fixed-quantity* cost-plus contract in this case, the Third Circuit's unanimous affirmance of the district court's dismissal of the indirect purchaser damage claims was entirely correct and should not be reviewed by this Court.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: March 27, 1981

Respectfully submitted,

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PROOF OF SERVICE

I, Milton J. Schubin, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 27th day of March 1981, I served copies of the foregoing Brief for Respondent Texaco Inc. in Opposition to Petition for Writ of Certiorari, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Mitchell A. Kramer, Steven Kapustin and Alice G. Burt, Esquires, Kramer and Salus, 1520 Locust Street, Philadelphia, Pennsylvania 19102. I further certify that all parties required to be served have been served.

Dated: March 27, 1981

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